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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77—596

GULF OIL CORPORATION,

Petitioner,

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF INTERVENOR THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK IN OPPOSITION

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The Public Service Commission of the State of New York ("New York"), an intervenor both in the court below and in the proceedings before the Commission, opposes, for the reasons set forth below, the petition for certiorari filed herein by the Gulf Oil Corporation ("Gulf Oil").

New York is a regulatory body established by the laws of New York State having jurisdiction, *inter alia*, over the sale of natural gas at retail within the state. As such it is directly interested in the actions of the Federal Power Commission (now the Federal Energy Regulatory Commission) in certificating the sale of natural gas by independent producers to the interstate

pipelines serving New York distributors, and in proceedings to enforce such certificate obligations. In this capacity New York participated both in the proceedings which led to the initial certification of Gulf Oil's warranty sale to Texas Eastern Transmission Corporation ("Texas Eastern") and in the several enforcement proceedings culminating in the commission's opinions and orders under review in this case. New York also intervened in support of the Commission in the proceedings in the Third Circuit Court of Appeals from which certiorari is sought.

REASONS FOR DENYING THE WRIT

At issue in the Third Circuit's decision in this case was the validity of the Federal Power Commission's interpretation of a gas purchase contract between Gulf Oil and Texas Eastern. Under this contract Gulf Oil warranted that during the contract term it would

> . . .have available for delivery hereunder on any day or days a volume not less than one hundred twenty five per cent (125%) of the Daily Contract Quantity in effect from time to time. . .(I App., p. 18)

Gulf Oil's warranty differed greatly from the vast majority of gas purchase contracts which have been certificated by the Commission in that it was not dependent upon gas reserves from any particular leasehold interest or interests. The warranty to have available a daily amount of gas was limited only by total delivery of approximately 4.4 Tcf (trillion cubic feet) required by the contract. This warranty provision was justified by Gulf Oil and Texas Eastern for the economic and operating advantages it provided to both parties. (I App., pp. 138-139). While a warranty, such as Gulf Oil's, which was not tied to a specific leasehold interest was rare when natural gas was considered plentiful, such a contract is unknown today when natural gas is scarce. Thus, interpretation of such warranty contracts cannot be expected to be a recurring question before the Federal Energy Regulatory Commission or the courts.

I. The Provisions Of The Natural Gas Act Protecting Gas Consumers Override The Policy Behind The Federal Arbitration Act

No conflict exists between the policy of the Federal Aribtration Act and the Third Circuit's decision upholding the Commission's right to determine the extent of Gulf Oil's duties under the warranty contract with Texas Eastern. Where the federal policy favoring arbitration conflicts with a federal policy favoring protection of a class of consumers, this Court has held that the policy emanating from the protective legislation should prevail. *Wilko v. Swan*, 346 U.S. 427 (1953).[1] The Third Circuit's and the Commission's decision in this case are based on the authority of the Natural Gas Act, the primary purpose of which is to protect consumers from exploitation by the natural gas companies. *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). The ultimate consumers on Texas Eastern's system will bear all losses resulting from Gulf Oil's breach of contractual duty. These losses can result from the higher prices paid for gas or alternative energy supplies used to make up the deficiencies, and from the disruption of service if alternative supplies cannot be found.

In granting the certificate approving the contract between Gulf Oil and Texas Eastern, the Commission relied heavily on its

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[1]Reliance on *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), as contrary is misplaced. The majority in *Scherk* found that because the contract "was a truly international agreement. . .[it] involves considerations and policies significantly different from those found controlling in *Wilko*." (417 U.S. 515.) Arbitration was thus favored in *Scherk* because of potential conflict of laws and comity problems which could arise from private litigation. (417 U.S. 516-520.) The instant case involves solely the laws of the United States, in particular those of national energy policy. While *William E. Arnold v. Carpenters*, 417 U.S. 12 (1974), involves matters of United States law, its application is inapposite here because the National Labor Relations Act views labor disputes as matters of private concern which should, to the extent possible, be resolved by arbitration. (417 U.S. 15-18.) Here, the issue is not confined to resolution of disputes between the parties to the contract but directly involves optimum service to gas consumers dependent upon Texas Eastern for their gas supply.

finding that the public interest would be served by a guaranteed supply of natural gas on a daily basis at a set price. (I App., pp. 136-137.) Abrogation of its contractual duties meant Gulf Oil was no longer meeting the public interest obligations imposed upon it by the certificate. Because the heart of the contract between Gulf Oil and Texas Eastern matched the public interest considerations which underlay its certification order[2], the Commission was justified in exercising its authority under the Natural Gas Act, and was not required to wait for the possible results of private arbitration[3] before taking the steps available to it under the Natural Gas Act to protect gas consumers.

II. Ordering Refunds Was A Proper Exercise Of The Commission's Authority

The Third Circuit upheld the commission's action in ordering refunds by Gulf Oil "for failure to make full deliveries in the past." (I App., p. 291.) Under the Commission's plan, Gulf Oil would return immediately an amount calculated by multiplying the difference between the contract price and the applicable area or nationwide rate by the volumes defaulted during each applicable rate vintage. (I App. 290-202.) This calculation would apply also to any future defaults by Gulf Oil. This amount would be recouped by Gulf Oil at the time total deliveries equal the total contract volumes (4.4 Tcf) less the defaulted volumes. At that point, Gulf Oil may add a surcharge to recover the vintaged amounts paid previously. (*Ibid.*) Assuming Gulf Oil delivered the entire contract volumes to Texas Eastern, it would recoup the total contract price for which it bargained. Texas Eastern's

[2]The fact that more than a dispute between the parties to the contract was involved is demonstrated by the Commission action in Opinion No. 692 (I App., pp. 118-147) rejecting the original settlement concurred in by both Gulf and Texas Eastern which would have resulted in additional payments to Gulf of over $144,000,000.

[3]As indicated in the Brief in Opposition to the Petition filed by Texas Eastern, it is far from clear that the arbitration provisions of the contract cover the issues Gulf, at the last minute, proposed to submit to arbitration. Texas Eastern has taken the position that they do not. (III App., pp. 1623-1624).

customers will eventually pay the total price, but they receive some compensation for the higher gas costs resulting from Gulf Oil's breach by gaining the time value of returned amounts.

The powers granted the Commission by Sections 7(c) and 16 of the Natural Gas Act, 15 U.S.C. §§717f(c) and 717o, include remedial powers to carry out the purposes of the Act, as the Third Circuit ruled in this case. The remedial power contained in Section 16 is a broad grant designed to provide an effective range of protection, as the court recognized in *Niagara Mohawk Power Corporation v. FPC*, 379 F.2d 153, 158-159 (D.C. Cir., 1967):

> The statutory authority to issue certificates or permits on condition implies broad authority to take effective action to achieve regulation in the public interest.
>
> * * *
>
> We observe that the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily not the issue of ascertaining whether conduct violates the statute, or regulations, but rather to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.

This broad grant of power has been ruled to apply to refund questions arising from breach of certificate authority. *Mesa Petroleum Company v. FPC*, 441 F.2d 182 (5th Cir., 1971).[4] The exercise of this remedial power must have a reasonable basis

[4]With all due respect, New York submits that the Third Circuit was wrong in stating "that the interpretations of Section 16 in *Mesa* and *Mobile Oil* are irreconcilable." *Mobil Oil Corporation v. FPC*, 483 F.2d 1238 (D.C. Cir., 1973) addressed Section 16 in the contest of *procedural* requirements of a rule-making. It was decided by the District of Columbia Circuit after that Circuit's earlier decision in *Niagara Mohawk* and after the Fifth Circuit decision in *Mesa*. In spite of this, the opinion in *Mobil Oil* contains no suggestion that these opinions are inconsistent, to say nothing of purporting to reverse or limit them.

which balances the competing interests involved while upholding the regulatory authority of the Commission (*Id.* at 186-188.)

The Commission plan in the instant case meets the requirements of these decisions. Immediate return of amounts relating to the defaulted volumes provides relief to those customers who have borne a substantial portion of the costs of Gulf Oil's breach. Immediate refund provides the most effective means of relief. *FPC v. Tennessee Gas Transmission Company*, 371 U.S. 145, 154-155 (1962). Permitting Gulf Oil to recoup these refunds upon completion of its contractual obligations, while not originally supported by New York, provides incentive for Gulf Oil to fulfill its duties which in the present situation has proved extremely effective.[5] Thus, it presents a rational means of dealing with the competing interests which enables the Commission to afford gas consumers the complete bond of protection which the Act was intended to provide. *Atlantic Refining Company v. Public Service Commission*, 360 U.S. 378, 388 (1959).

III. The Decision In This Case Addresses A Narrow Question

Gulf Oil raises the specter of additional gas supply curtailments on the East Coast resulting from the Commission decision because of the "accelerated depletion of currently proven natural gas reserves" (Gulf Oil Petition, p. 27). This argument is disingenuous because Gulf Oil's continuing breach of its contract prior to the order in issue here meant that substantially less gas was made available to Texas Eastern, at a time when it was in deep curtailment, than under the most restrictive reading of the certificate.

More important, however, is the crucial distinction between Gulf Oil's warranty contract and the vast majority of gas purchase contracts. Gulf Oil warranted that it would have available a set level of gas (625 Bcf) every day over the life of the contract. Most conventional gas purchase contracts dedicate

[5]As a direct result of the refund condition, Gulf has for some time been delivering to Texas Eastern well in excess of 625 Bcf per day.

specific reserves under terms which at best cite the daily supply of gas the producer is obligated to deliver to determinations based upon the economic and physical characteristics of the reserves. Far from constituting a threat to overproduction, the conventional gas purchase contracts have led to Commission proceedings, so far largely abortive, to enforce producer contract obligations to expedite production thereunder. *See, Policy With Respect to Enforcement of Deliverability and Rendition of Natural Gas Services Under Certificated Arrangement, Docket No. RM76-8*, Order Nos. 539, 539-A, and 539-B (October 14, 1975; March 26, 1976, and, July 30, 1976, respectively).

The situation presented by Gulf's breach of its warranty certificate, though important on its own terms and in its effect on Texas Eastern and its customers, is unique. Unfortunately, the action taken by the Commission to remedy the situations can have little, if any, carry-over to the normal gas purchase contract. Gulf's efforts to blow the case up into one of general significance is thus totally without substance, even assuming that, contrary to fact, the general problem facing the gas industry was slowing down gas development and production rather than taking all available steps to accelerate it.

CONCLUSION

Gulf Oil Corporation's petition for writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

Respectfully submitted.

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